

trustmediation

~ not-for-profit dispute resolution ~

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Mediating Personal Injury Claims

Tips and Traps from 30 personal injury cases mediated in 2008

90% of the first 30 personal injury mediations dealt with by Trust Mediation this year settled on the day or shortly afterwards. Trust Mediation, chaired by Sir Henry Brooke, is a specialist mediation provider dealing solely with personal injury cases. It has been running for nearly a year and its panel of mediators have been reflecting on the do's and don'ts for this type of mediation. The success rate is higher than many would have expected, especially those who took the view that mediation had little to offer in this area. (See "PI Practitioners Are Doing It For Themselves: Settlement Meetings and Resistance to Mediation", PI Brief Update Law Journal 31 March 2008.) On reflection, however, these results are perhaps not unusual given that in these mediations the mediators, as well as the party's representatives, are all experienced personal injury practitioners.

Here are some tips and traps for personal injury lawyers arising from the experience gained from some of these 30 cases.

Do Prepare.

Reading the file the night before is not sufficient. Statistically, a mediation is a serious settlement opportunity and good preparation can maximise the prospects of settlement. The steps to be taken include:

- Carry out a technical and commercial analysis of your case.
- Consider whether you need to obtain any further evidence before you mediate and, if you do, whether you need to postpone. Alternatively, you might make it a condition of the mediation that the other party provide such evidence before or at the mediation. The emphasis here is on what is necessary rather than what is desirable. All that you need to mediate is sufficient evidence to make a business decision. You certainly do not need a trial bundle.
- Read the Mediation Agreement. This determines the contractual basis of the mediation. Are you satisfied with its terms? Does it contain appropriate provisions about costs? (See "Mediation – A Costs Trap for the Unwary", PI Brief Update Law Journal 31 May 2008.)
- Prepare a position statement. This can be drafted with two readers in mind. First, the mediator, who will read the key documents that you send to him, including any statements of case. There is no need to replicate that information but it is helpful to give the gist of the case in a bullet point form. Secondly, the other party. The position statement is an opportunity for you to talk directly to the other party. You might be able to use this chance to leave that party thinking, before the mediation starts, that the case against him is rather stronger than he thought.
- Prepare a negotiating strategy. It is one thing to determine your high/low bracket valuation of the claim, but another to decide whether or not you will make the first offer, what figure you start at and how you intend to move from there to final settlement.
- Consider who should attend. Will counsel attend? If your client wishes to involve, say, a family member in the settlement decision then he/she should attend or be available. The same applies to any other person who has to authorise settlement.

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- Work through the above with your client and consider what role he will play at the mediation. If he is a confident witness who is likely to make a good impression you might consider it appropriate for him to use the opening meeting to spell out the gist of his evidence on a disputed point. Alternatively, this meeting is a useful opportunity for a client to get something off his chest. It is rare that you can, from the witness box, tell the other party how you really feel about what your family has been put through following an accident. Ironically, a mediation can in this respect provide a client with more of a “day in court” than attending trial.
- Prepare visual aids, diagrams or injury photographs that might be useful in getting over an important point and make the most of the fact that this is a face to face meeting.
- Finally, and it is easy but unwise to skip this step, walk round the other side of your desk, sit down and spend some time thinking about the case from your opponent’s perspective. How would you see the strengths and weaknesses standing in his shoes?

(PS All this is necessary work that you are entitled to be paid for!)

Do go into the mediation with an open mind

Mediation is an opportunity to listen to the other side and assess its case. Preparing thoroughly does not mean inking in a “bottom line” which you deliver in the opening statement. If you demonstrate that you are not prepared to listen to the other side you are making it very difficult for yourself when you seek to persuade them to change their position.

Do take the mediator into your confidence

A mediator will not generally expect you to put all your cards face down on the table but most mediators will say that the more you level with the mediator the more he can help you. Treating the mediator as the other side’s negotiating agent is usually an approach that just gets in the way.

Do put time aside

One issue, when planning the mediation, is to consider how long the mediation should be. Half a day, 1 day, 1 day +? The mediator should ascertain at an early stage if any person attending has any time constraints. (The same applies to anyone who needs to be involved in the settlement decision by giving authority over the phone.) There are different schools of thought about how long mediations should last. One view is that you put aside a day and arrange to continue into the evening, if necessary. Another is that mediation, like litigation, should be proportionate wherever possible – and therefore time-limited in appropriate cases. There is ample evidence to demonstrate that the time limited model can work very well indeed. Wherever possible, however, it can occasionally prove to be crucial for all involved to be available to continue with a mediation after its agreed time slot.

Do be patient

Invariably it is difficult to predict how a mediation will progress. Sometimes it becomes clear very early that a settlement will be achieved and it is merely a matter of agreeing the terms. On other occasions a gulf remains between the partiesuntil the very last moment. A mediator sometimes needs to ask for a party’s forbearance because,

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although progress can be made, it will take some time. What is a very simple issue for party A may take party B an hour to come to terms with. This can be difficult for lawyers and parties who are used to living highly pressured 100 mile an hour days involving tens and tens of decisions an hour. But patience may be rewarded with a settlement.

Don't assume that a mediation is a joint settlement meeting (JSM) with the added cost and hindrance of a mediator.

The vast majority of claims will settle, as they always have done, by routine negotiation. This may take place by letter, email, phone or face to face meeting. A meeting might be chat over coffee shortly after the claim has been made or a more formal JSM, held shortly before trial, with full legal teams lead by QCs. There are no rights and wrongs. If the parties are making progress with negotiations there is no need to mediate. Litigators with experience of the full range of dispute resolution techniques refer to the ubiquitous "horses for courses" phrase and can differentiate between the situations where they use a JSM and those where they would definitely use mediation. Multi party cases, previous problems with negotiations and cases involving fatalities or other issues of high emotion are examples of the criteria that will cause some litigators to push for mediation. There may be a simpler reason: if the instructions are for an earlier settlement mediation may be chosen to maximise the prospects of reaching that. Lawyers who have never attended a mediation can struggle to make a credible argument that JSMS render mediation redundant.

Don't address your opening statement to the mediator

The mediator decides nothing. There is no need to convince or persuade him of the strength of your case. The opening statement is often the only opportunity you have to talk to the other party – who might be the defendant, the insurer (see below) or a solicitor representative. Your objective will often be to make the other party think, by the end of your opening statement, that he is up against a strong team who have a good case and will have plenty to say at trial.

Don't mediate without the insurer being there.

If the defendant is insured it is usually in the claimant's interest to have a representative of the insurer present. The insurer is the decision-maker and will take a commercial rather than a legalistic view. As claimant you can make the insurer's presence a pre-condition of the mediation, although the insurer's response may be to refuse to mediate (for example, if the insurer considers that it is not economical, given the value of the claim, to send a representative in addition to a solicitor). You should ensure that whoever attends does have, or can definitely obtain, authority to settle.

Don't refuse to mediate because you have a strong case.

To do this may amount to passing up the opportunity of finding out about the other side's case. If their case is stronger than you think you may prefer to find that out in the mediation room rather than at trial. In other words, use mediation as a risk assessment tool. This is what legal expenses insurers have in mind when they (increasingly) encourage solicitors to mediate. Those facing risk generally like to take the very best steps to assess it. If that is the view of your legal expenses insurer it may well be one that is shared by your managing partner.

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Don't miss the opportunity to deal with costs and damages.

Finally, another “managing partner delight” point. Make it clear, when you agree to mediate, that you expect to use the mediation to agree damages and costs, with a view to costs being paid with damages (and not 12 months later). Make mediation work for you as well as your client.

And finally....

Most personal injury claims settle because they are handled by good negotiators. What some practitioners are now recognising is that mediation, as well as getting everyone to read their file, prepare and get into the same room, is an excellent environment for them to deploy their negotiation skills.